Ferguson Electric Company, Incorporated *and* International Brotherhood of Electrical Workers, Local #241. Case 3–CA–19630

January 19, 2000

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN TRUESDALE AND MEMBERS FOX AND HURTGEN

On August 7, 1996, Administrative Law Judge Joel P. Biblowitz issued a decision and recommended Order finding that the Respondent unlawfully failed to hire David Carr, in violation of Section 8(a)(1) and (3) of the Act.[1] The judge deferred to a supplemental proceeding the issues regarding Carr's entitlement to backpay. The Board adopted the judge's recommended Order on September 24, 1996.[2] On April 3, 1997, the General Counsel filed an Application for Summary Entry of a Judgment with the United States Court of Appeals for the Second Circuit. The court enforced the Board's Order on April 29, 1997.[3]

The General Counsel issued a compliance specification and notice of hearing on June 11, 1997. In its July 2, 1997 answer, the Respondent disputed the appropriate backpay period and the General Counsel's contention that Carr had no interim earnings.

On January 14, 1998, the parties jointly filed a motion to transfer the proceeding to the Board. The parties agreed to forgo oral testimony and stipulated that the following would constitute the record in the instant proceeding: the August 7, 1996 decision and recommended Order of the administrative law judge; the September 24, 1996 Order of the Board; the April 29, 1997 judgment of the United States Court of Appeals for the Second Circuit enforcing the Board's Order; the compliance specification and notice of hearing and the Respondent's answer thereto; and a stipulation of facts and exhibits.

On April 15, 1998, the Board issued an order approving the stipulation of facts and transferring the proceeding to the Board. The Respondent filed a brief in response to the compliance specification. The General Counsel also filed a brief wherein, inter alia, he modified the amount of backpay set forth in the compliance specification.

On the entire record, the Board makes the following

FINDINGS OF FACT

The parties have stipulated to the following facts. David Carr applied to the Respondent for work as an electrician at the Respondent's Kendall jobsite on August 21, 1995.[4] The Respondent hired electricians Matthew McEver and Patrick Pompa to work at the Kendall jobsite beginning on August 30, 1995. On April 2, 1996, the last date on which the Respondent performed work at the Kendall jobsite, electricians James Carnahan and Darren Felt worked there for the Respondent. Carnahan and Felt began working for the Respondent at its Cornell Veterinary School jobsite on April 3, 1996, and were continuously employed at that jobsite by the Respondent through June 30, 1996.

When Carr applied to the Respondent for work on August 21, 1995, and continuing through June 30, 1996, Carr was employed by the Union as a full-time organizer, paid at the annual rate of $41,185, plus benefits.[5] Carr's primary responsibility was to organize nonunionized employers and their employees. His duties as an organizer included selecting employers to organize, soliciting nonmembers to join the union, recruiting current members to participate as voluntary union organizers, preparing and distributing organizing materials, conducting organizational meetings, filing representation petitions and unfair labor practice charges, and preparing reports on these activities.

One organizing method Carr used was to seek employment as a craft employee with a nonunion employer, such as the Respondent. If hired by the Respondent, Carr would have engaged in organizing activity during his nonworking time. While working for a nonunion employer, Carr would remain an employee of the Union and would be subject to the direction and control of the Union with respect to his organizing activities. He would be permitted by the Union to keep any pay he received for the services he performed as an employee of the nonunion employer. He also would continue to receive his regular union salary and other benefits, as described above. The Union reimburses Carr for expenses incurred for organizing while employed with a nonunion contractor. Carr's job performance as an organizer during his employment with a nonunion contractor would be evaluated by the Union based, in part, on his organizing while so employed.

Carr is not permitted by the Union to seek or obtain employment with a nonunion employer such as the Respondent unless the Union is seeking to organize the employer. When the Union's organizational effort would no longer be served by Carr's employment with a targeted employer, Carr would be expected to terminate his employment there.

Carr took office as business manager of the Union on July 1, 1996. Had Carr been employed by the Respondent at that time, he would have resigned to devote his full attention to his duties as union business manager.

[1] JD(NY)–50–96.

[2] The Board's decision is unpublished.

[3] *NLRB v. Ferguson Electric Co.,* No. 97–4655.

[4] As noted by the judge in the underlying unfair labor practice proceeding, Carr noted on his application that he was employed as a union organizer and that he was seeking employment with the Respondent in order to organize for the Union.

[5] Carr's benefits included health, disability, and life insurance; paid vacation and holidays; and contributions on his behalf to the union pension fund.

Carr was employed solely by the Union, and was not employed by any nonunion contractors, from August 30, 1995, through July 1, 1996.

Issues

This case presents the following issues:

(1) Whether Carr is entitled to any backpay, and if so, the correct amount.

(2) Whether Carr would have continued to work for the Respondent on its Cornell Veterinary School jobsite following the completion of the Respondent's work at the Kendall jobsite.

(3) Whether Carr's earnings from his employment as a full-time union organizer during the backpay period should be counted as interim earnings and offset against gross backpay.

Discussion and Conclusions

A. Entitlement to Backpay

As the judge correctly noted, Carr's status as a paid, full-time union organizer, or "salt," does not deprive him of the protection of the Act. Employment applicants are "employees" within the meaning of Section 2(3) of the Act, even if they are paid by a union to organize their prospective employer. *NLRB v. Town & Country Electric,* 516 U.S. 85 (1995). The Board's traditional remedy for an employer's discriminatory refusal to hire an employee is a make-whole order, including an award of backpay. See, e.g., *M.J. Mechanical Services,* 325 NLRB 1098 (1998); *The 3E Co.,* 322 NLRB 1058 (1997); *Ultrasystems Western Constructors,* 316 NLRB 1243 (1995). The burden is on the General Counsel to prove the gross amount of backpay due. *Roman Iron Works*, 292 NLRB 1292 (1989), citing *NLRB v. Brown & Root, Inc*., 311 F.2d 447, 454 (8th Cir. 1963).

In *Hollander Electric,* 317 NLRB 1095 (1995), cited in the Respondent's brief, the Board reversed the administrative law judge and found that an employer violated Section 8(a)(1) and (3) by rescinding the hiring of an individual before he could start work, after the employer learned that the individual was a full-time, paid union official. The judge also found that the individual was not entitled to backpay, reasoning that backpay would be a windfall, in light of his union employment. In reversing the judge, the Board held:

> Backpay is an essential part of the Board's traditional remedy for a discriminatory discharge. [The discriminatee's] retention of employment with the Union after his undisputedly unlawful discharge by the Respondent has no relevance to his entitlement to this make-whole remedy. [Id. at fn. 3.]

The Board left for resolution at a compliance proceeding "the question whether [the discriminatee's] postdischarge earnings with the Union are to be considered interim earnings deductible from backpay." Id.[6]

The Respondent does not dispute Carr's employee status or his eligibility, in principle, for backpay. However, the Respondent contends that no backpay is due because: (1) Carr's anticipated employment would have been for an indeterminate and indefinite time period; (2) Carr's earnings as a paid union organizer are interim earnings and exceed what he would have earned had he been hired and remained in the Respondent's employ; and, (3) Carr did not make a reasonable effort to mitigate damages.

B. Backpay Period; Gross Backpay

In his amended compliance specification, the General Counsel contends that the backpay period runs from August 30, 1995, to July 1, 1996. We agree.

Carr applied to the Respondent for work as an electrician at its Kendall jobsite on August 21, 1995. The Respondent's first employment of electricians at the Kendall site following Carr's August 21 application occurred on August 30, 1995, when the Respondent hired Pompa and McEver. Thus, as the Respondent concedes, and we find, "August 30, 1995 . . . is the most appropriate start date to use in calculating backpay."

The Respondent continued to employ electricians at the Kendall jobsite until the job ended on April 2, 1996.[7] Only two electricians, Carnahan and Felt, were working at the Kendall job when it ended. They transferred to the Respondent's Cornell Veterinary School jobsite beginning on April 3, 1996, and were continuously employed there through June 30, 1996. Thus, it is clear that there was some continuity in the Respondent's work force from project to project.

An employer's backpay obligation can end at the completion date of the construction project in question, provided that the employer shows that, under its established policies, an employee hired into a position like the one unlawfully denied the discriminatee would not have been transferred or reassigned to another job after the project at issue ended. *Casey Electric,* 313 NLRB 774 (1994), citing *Dean General Contractors*, 285 NLRB 573 (1987). The Board resolves compliance-related uncer-

[6] In its brief, the Respondent asserts that the Board, in *Hollander,* "has recognized that earnings received by a paid Union organizer during the backpay period may be treated as interim income and deducted from gross backpay." The Respondent has mischaracterized the Board's decision in this respect. The Board did not determine that such earnings "may be treated as interim earnings." It left the question of the status of such earnings open for consideration in further proceedings. *Hollander,* subsequently was resolved without being returned to the Board; and the instant case presents the first opportunity the Board has had to address the treatment of a "salt's" full-time union salary in the context of a backpay proceeding.

[7] The parties' stipulation recites that "[t]he last date on which Respondent performed work at its Kendall jobsite was April 2, 1996." The Respondent asserts in its brief that "Respondent's work at Kendall ceased on April 6, 1996." We shall rely on the date contained in the parties' stipulation.

tainties or ambiguities against the wrongdoer. *Kansas Refined Helium Co.,* 252 NLRB 1156–1157 (1980).

The Respondent contends that "[i]t is unlikely that [Carr] would have lasted to the end of the [Kendall] job or been transferred to Cornell" because Carr "would have been the least senior employee at Kendall." Thus, the Respondent contends that the backpay period for Carr should end with the completion of the Kendall job. Assuming arguendo that the Respondent's practice was to retain electricians by seniority,[8] the Respondent's own payroll records[9] belie the Respondent's contention. Carnahan, one of the Respondent's two employees who worked through the end of the Kendall job and thereafter transferred to the Cornell job, does not appear on the Respondent's payroll records until September 5, i.e., 1 week after Carr would have started working, absent the Respondent's discriminatory refusal to hire Carr. Thus, it appears that, at a minimum, Carr would have been senior to Carnahan.

Alternatively, the Respondent contends, in agreement with the General Counsel's amended compliance specification, that the backpay period should end on July 1, 1996, when Carr would have quit his employment with the Respondent to work exclusively for the Union. We agree, and we so find.[10]

Accordingly, we find, in agreement with the amended compliance specification, that the backpay period ran from August 30, 1995, through July 1, 1996, and that Carr is entitled to gross backpay in the amount of $25,626.

[8] The record does not establish, and we do not find, that the Respondent's practice was to retain electricians by seniority. In fact, the record does not clearly describe the Respondent's practices regarding retention of employees within and between projects. As noted, it is the Board's practice to resolve ambiguities against the wrongdoer.

[9] A single-page payroll record covering the period from August 30 through September 8, 1995, is included in the parties' stipulation as attachment A.

[10] We find no merit in the Respondent's contention that, because the duration of Carr's employment is controlled solely by the Union's organizational interests, his employment was an indeterminate and indefinite time period. As the Board explained in *Sunland Construction Co.,* 309 NLRB 1224, 1229 fn. 33 (1992), paid union organizers do not forfeit their status as "employees" because they do not intend to retain their employment beyond the duration of an organizing campaign. It follows that they do not similarly forfeit their eligibility for backpay. To follow the Respondent's argument to its logical conclusion, only those employed for an express contractual term would be determinate and definite enough to establish an entitlement to backpay. In any case, here we have determined with specificity the period of time during which Carr would have remained in the Respondent's employ. To the extent that the Respondent argues that the backpay period would have ended earlier than July 1, 1996, because the Union would have pulled Carr off the job with the Respondent at the end of its organizing effort, we note that the Respondent has produced no evidence by stipulation or otherwise to show that the organizing effort would have ended prior to July 1, 1996. We find inapposite cases cited by the Respondent in support of its argument, as those cases arose in the context of Title VII of the Civil Rights Act of 1964, 42 U.S.C.A. 2000e(b).

C. Status of Wages Paid to Carr by the Union

Having found that Carr is entitled to backpay, we must decide whether his earnings from the Union as a full-time organizer are earnings from secondary employment, as the General Counsel contends, or interim earnings, as the Respondent contends. The distinction is a critical one. A discriminatee's interim earnings are offset against backpay, while earnings from secondary employment held by a discriminatee prior to the backpay period are not offset.[11] *Plumbers Local 305 (Stone & Webster)*, 297 NLRB 57, 61 (1989); *American Pacific Concrete Pipe Co.,* 290 NLRB 623, 627 (1988); and *Birch Run Welding,* 286 NLRB 1316, 1318 (1987).

The General Counsel contends that Carr's union wages should not be offset because they are earnings from secondary employment from a job held prior to the backpay period, akin to earnings from "moonlighting," which the Board has not treated as interim earnings. In support, the General Counsel cites the Board's holding in *Sunland Construction Co.,* 309 NLRB 1224, 1227 (1992), that:

> A person may be the servant of two masters, not joint employers, at one time, as to one act, if the service to one does not involve abandonment of the service to the other.

Relying on that principle and on *V.R.D. Decorating,* 322 NLRB 546 (1996),[12] the General Counsel contends that there is no basis for applying the law regarding backpay differently to union salts than to other discriminatees who hold secondary jobs prior to and during the backpay period.

The Respondent contends that Carr's full-time organizing position with the Union is, by its very nature, inconsistent with the definition of secondary employment, or "moonlighting" because it was not supplemental or secondary in nature and performed outside full working hours. It contends that Carr's union position was his primary employment and source of income and that, but for his union position, Carr would not have sought ancillary employment with the Respondent. The Respondent further contends that Carr's purpose in seeking employment was to organize the Respondent's employees, and

[11] As noted by the General Counsel, any increases beyond the usual number of hours of a discriminatee's secondary employment during the backpay period are deductible as interim earnings. *Kansas Refined Helium Co.*, 252 NLRB 1156, 1160 (1980). This is not an issue here, because Carr was a salaried employee of the Union at all relevant times.

[12] In *V.R.D.,* the Board ordered the employer to make whole a full-time, salaried union business manager whom it had discriminatorily denied employment, subject to a showing at compliance, pursuant to the test set out in *Dean General Contractors*, 285 NLRB 573, 573–574 (1987), whether the discriminatee would have continued working for the employer at successive construction projects. In ordering the traditional make-whole backpay remedy, the Board did not address the issue we consider here regarding the status, for backpay purposes, of wages paid to a salt by a union.

that while so engaged, Carr would have been furthering the Union's interests rather than the Respondent's, and would have remained under the direction and control of the Union. Thus, according to the Respondent, Carr's Union wages are not akin to earnings from "moonlighting" because they would not be earnings from "extra effort" expended "outside full working hours," as contemplated by the Board *in Birch Run Welding,* supra at 1318, and *Henry Colder Co.*, 186 NLRB 1088 (1970).

We do not find the Respondent's argument persuasive, and accordingly find that the wages paid Carr by the Union are earnings from secondary employment, akin to moonlighting, and are not properly offset against gross backpay. We reject the Respondent's position primarily because it is based on the premise that loyalty to a union and acceptance of its directions pertaining to organizing activities are incompatible with an employee's duty to an employer, including an employer that the employee seeks to organize. As explained below, that premise is seriously flawed.

In *NLRB v. Town & Country Electric,* 516 U.S. at 95, the Supreme Court answered in the negative the question whether service to a union for pay necessarily involves abandonment of service to an employer.[13] There, the Court observed that

> Common sense suggests that as a worker goes about his *ordinary* tasks during a working day . . . he or she *is* subject to the control of the company employer, whether or not the union also pays the worker. . . . Moreover, union organizers may limit their organizing to nonwork hours. [Citations omitted.] If so, union organizing, when done for pay but during *nonwork* hours, would seem equivalent to simple moonlighting, a practice wholly consistent with a company's control over its workers as to their assigned duties.

Contrary to the Respondent's contention, here there is simply no basis in the record for finding that Carr's activities as a paid union organizer would have been other than incidental to the duties he sought to assume when he applied to the Respondent for work as an electrician. That is, no party to these proceedings has claimed that Carr did not intend to perform fully the electrical work assigned by the Respondent, or that he would not have been subject to the Respondent's direction and control in the performance of his assigned work, or that the Union would have attempted to interfere with Carr's performance of assigned work. Further, there is no claim that Carr would have engaged in organizing during worktime, or subordinated his assigned electrical work to his organizing efforts, or attempted to further the Union's interests at the expense of the Respondent's interests, or engaged in unlawful conduct. To the contrary, the parties have stipulated that "[i]f hired by the Respondent, Carr would have engaged in organizing activity *during his non-working time*." (Emphasis added.) The parties have further stipulated that, while working for a contractor such as the Respondent, "Carr would remain an employee of the Union *and would be subject to the direction and control of the Union with respect to his organizing activities*." (Emphasis added.) No party contends that the Union would have directed or controlled electrical work performed by Carr while in the Respondent's employ.

We conclude, based on the above, that as Carr "goes about his ordinary tasks during a working day . . . he . . . *is* subject to the control of the company employer." *NLRB v. Town & Country Electric*, supra. Thus, Carr's primary job, had he been hired by the Respondent, would have been the performance of the electrical work assigned to him by the Respondent. We recognize that Carr would not have sought employment with the Respondent but for the Union's desire to organize the Respondent's employees. That does not alter the fact that Carr would have devoted his full effort and attention to—and would have been paid by the Respondent for—performing duties assigned and controlled by the Respondent during the workweek. As an employee of the Respondent lawfully engaged in attempting to organize the Respondent's employees, Carr's conduct would have been protected by Section 7 of the Act.[14] In this respect, Carr would have been no different from any other prounion employee who lawfully attempted to organize his fellow employees.

Under the circumstances, we can see no rational basis for treating the income Carr would have received as a result of performing work for the Union[15] outside his employment at the Respondent differently than we would treat supplemental income Carr might similarly have received from any other source. Or, to put it another way, we can see no rational basis for treating Carr differently because his supplemental earnings come from the Union than we would treat him if his earnings came from some other secondary source, albeit a source which

[13] The Board similarly has rejected generalized arguments that paid union organizers who seek employment with nonunion contractors for the purpose of organizing will engage in union activities to the detriment of work assigned by the employer, or will embark on acts inimical to the employer's legitimate interests. See *Sunland Construction Co.,* supra at 1229–1230.

[14] Employer restrictions on union solicitation during nonworking time in nonworking areas are presumptively invalid under the Act. "This is true even if a company perceives those protected activities as disloyal. After all, the employer has no legal right to require that, as part of his or her service to the company, a worker refrain from engaging in protected activity." *NLRB v. Town & Country Electric*, supra at 96.

[15] The record does not contain evidence regarding whether Carr's continued receipt of his union salary would have been conditioned on his performing duties for the Union during times when he was not working for the Respondent. The question is of no consequence, however, given our finding that such union duties would have been secondary in nature.

might be more palatable to the Respondent. The distinction for backpay purposes, is in the nature of the additional earnings, and not the source of their payment.

Accordingly, we find that, absent the Respondent's discrimination against Carr, Carr's earnings during the term of his employment at the Respondent would have been the combined total wages paid to him by the Respondent and secondary earnings paid to him by the Union. We will not offset Carr's secondary earnings from the Union against gross backpay. To decide otherwise would be to permit the Respondent to benefit from its own misconduct. See, e.g., *Big Three Industrial Gas*, 263 NLRB 1189, 1190 (1983).

D. Mitigation of Damages

We have found that the General Counsel has satisfied his burden to show the gross amount of backpay to which Carr is entitled. The Respondent thus has the burden to produce evidence that would mitigate its liability.[16] See, e.g., *Tubari Ltd. v. NLRB*, 959 F.2d 451, 453 (3d Cir. 1992). A discriminatee must make reasonable efforts to secure interim employment in order to be entitled to backpay. See *Electrical Workers (IBEW) Local 3 (Fischbach & Moore),* 315 NLRB 1266 (1995). Where an employer demonstrates that an employee did not exercise reasonable diligence in his efforts to secure employment, then the employer has established that the employee has not properly mitigated his damages. *Tubari Ltd. v. NLRB,* 959 F.2d at 454; *Iron Workers Local 118 v. NLRB,* 804 F.2d 1100, 1102 (9th Cir. 1986). In seeking interim employment, a discriminatee need only follow his regular method for obtaining work.[17] See, e.g., *Big Three Industrial Gas,* 263 NLRB 1189, 1216–1217 (1982); *Seafarers Union (Isthmian Lines)*, supra. Generally the discriminatee must seek interim employment substantially equivalent to the position of which he was unlawfully deprived, and that employment must be suitable to a person of like background and experience. *Tubari,* 959 F.2d 454, and cases cited.

As set forth in detail above, the parties have stipulated that Carr's regular method of obtaining electrical work was to seek employment with nonunion contractors in conjunction with the Union's organizing policy. The stipulated record does not contain any facts regarding Carr's efforts to obtain interim employment or the "universe" of employers to which Carr might have applied for work. Nonetheless, the Respondent contends that Carr should be denied backpay because he unreasonably limited his search for interim employment to nonunion contractors who were targeted by the Union for organizing.

As we have already noted, it was the Respondent's burden to show that Carr unreasonably failed to mitigate damages. By propounding its bare argument, without supporting facts or evidence, the Respondent has failed to satisfy its burden. In effect, the Respondent asks the Board to establish in "salting" cases a *per se* rule that a failure to mitigate damages will be found in any case in which a union places limitations on the "universe" of employers to whom an organizer may apply for work. We can discern no rational reason for establishing such a rule.

In *Lundy Packing Co.,* 286 NLRB 141, 142 (1987), enfd. 856 F.2d 627, 630 (4th Cir. 1988), the Board reviewed the factors which the Board finds relevant to the determination whether a discriminatee's job search, and thus his mitigation effort, has been reasonable:

> It is well settled that the reasonableness of a discriminatee's efforts to find a job and thereby mitigate loss of income resulting from an unlawful discharge need not comport with the highest standard of diligence, i.e., he or she need not exhaust all possible job leads. Rather, it is sufficient that the discriminatee make a good-faith effort. In determining the reasonableness of this effort, the discriminatee's skills, experience, qualifications, age, and labor conditions in the area are factors to be considered. The existence of job opportunities by no means compels an inference that the discriminatees would have been hired if they had applied. The respondent's obligation to satisfy its affirmative defense is to show a "clearly unjustifiable refusal to take desirable new employment." Uncertainty in such evidence is resolved against the respondent as the wrongdoer. [Citations omitted.]

We have rejected the suggestion that a different mitigation test should apply in "salting" cases. As the Board's decision in *Lundy* illustrates, the traditional mitigation analysis takes into account all of the factors that bear on a discriminatee's job search. We find that the application of the Board's traditional analysis in "salting" cases will best effectuate the purposes of the Act. Consistent with the traditional approach to mitigation issues, the Board may examine the scope and extent of limitations imposed by a union on the ability of its employees to seek employment under the union's "salting" policy in order to determine whether reasonable attempts to mitigate damages have been undertaken.

[16] We thus disagree with our dissenting colleague's suggestion that the Union, rather than the Respondent, has the burden of establishing such facts going to mitigation as the restrictions placed on Carr's choice of interim employers. We also note that it is customary in backpay proceedings to allocate burdens among the General Counsel (the proponent of the compliance specification) and the Respondent, and not to assign burdens to the Charging Party (the Union).

[17] In this regard, we find relevant and instructive the Board's observation in *Seafarers Union (Isthmian Lines),* 220 NLRB 698, 699 (1975), that "[w]hen the Respondent chose to discriminate . . . it did so with knowledge of the work search habits of [the Union's] members and it ought not now be heard to complain that [the discriminatees'] habits bar [them] from backpay since it is clear that [the discriminatees] fulfilled [their] job search responsibilities as any [union member] normally would."

However, the mere existence of such limitations, standing alone, is not dispositive of the issue. If, after an examination of all relevant facts, the Board determines that reasonable mitigation efforts have not been undertaken, then the Board may find that a discriminatee has forfeited his eligibility for backpay.

Accordingly, if the record before us contained substantial evidence showing that Carr failed to make a good faith effort to follow his usual method of seeking employment, or that the Union's policies unreasonably limited Carr's job search, or that Carr otherwise unreasonably failed to mitigate damages, such evidence would favor our finding merit in the Respondent's contentions. As we have found, however, the Respondent has made no such showing.[18] Because there is no evidence that Carr failed to make reasonable efforts to mitigate damages, we find that he is eligible for backpay in the amount set forth in the amended compliance specification.

ORDER

The National Labor Relations Board orders that the Respondent, Ferguson Electric Company, Incorporated, Plainville, Connecticut, its officers, agents, successors, and assigns, shall pay to David Carr, the sum of $25,626, with interest to be computed in the manner set forth in *F. W. Woolworth Co.,* 90 NLRB 289 (1950), and *New Horizons for the Retarded*, 283 NLRB 1173 (1987), minus tax withholdings required by Federal and state laws.

MEMBER HURTGEN, dissenting in part.

For the reasons set forth below, I would place certain evidentiary burdens on the General Counsel, and I would find that these burdens have not been met. I recognize that, in the traditional 8(a)(3) case, the burden is on the employer to show that employment would have been terminated at some subsequent point even if the discriminatory discharge had not occurred. However, in those traditional cases, the employer effectively controls the duration of employment, and thus the employer should bear the burden of going forward with the evidence. By contrast, in the instant case, the Union effectively controls the duration of employment, and thus the Union should bear the burden of going forward with the evidence. That is, the Union would permit Carr to work for Respondent at Kendall so long as the Union found it advantageous for Carr to continue the organizing campaign. The duration of an organizational campaign is a matter that is peculiarly within the knowledge of the Union. Thus, the Union should bear the burden of producing the evidence with respect thereto.[1]

The same rationale applies to future jobsites. In this regard, under *Dean General Contractors*, 285 NLRB 573 (1987), it is presumed that, absent a discriminatory discharge from a job, the employee would have been transferred to a new job after the first job was completed. However, in the case of a "salt," it cannot be presumed that, after seeking to organize one site, the employee would have been transferred to another site. Even if the employer's practice is to do so, the issue of whether the employee will in fact transfer is ultimately dependent on whether the Union wishes to organize the new site. Again, these are matters peculiarly within the Union's knowledge, and thus it should bear the burden of producing the evidence.[2]

The forgoing matters have not been shown, and thus the Union and the General Counsel have not established the backpay period or the amount of gross backpay. In addition, even if they had done so, I would find that the strictures placed by the Union on Carr's efforts to obtain interim employment are limitations placed on his ability to satisfy his obligation to make reasonable efforts to mitigate damages. In order to remain eligible for the backpay award, Carr was required to mitigate damages by making reasonable efforts to obtain interim employment. The Union placed limitations on the type, and hence the number, of employers from whom Carr could have sought interim employment, as well as the potential duration of his interim employment. That is, the Union would permit him to work only for those employers at which he could fulfill his union function, i.e., only for nonunion electrical contractors who were targeted for union organizing. Thus, Carr's availability for interim employment was limited by his union.

[18] Similarly, we reject for lack of supporting evidence the Respondent's further contention, in reliance on *Tubari Ltd. v. NLRB*, 959 F.2d 451 (3d Cir. 1992), that even if the Board finds reasonable the union-imposed limitations on Carr's search for interim employment, the Board should find a failure to mitigate, based on Carr's refusal to broaden his employment search to include other jobs commensurate with his skills as an electrician, once he had attempted unsuccessfully, for a reasonable period, to secure employment substantially equivalent to that denied him by the Respondent.

The Respondent suggests that a union member discriminatee has a duty, in effect, to "lower his sights" and seek employment with nonunion employers who are not targeted for organizing if, after a reasonable period, he is unable to obtain employment comparable to that which he was denied. Assuming for the sake of argument that this is so, we would not find that Carr failed to make reasonable efforts to mitigate because, as we have found, the Respondent has not met its evidentiary burden. In that regard, however, we note that in other cases involving a union member's duty to seek interim employment, the Board has not required union member discriminatees to seek nonunion employment where to do so would subject the individual to discipline or expulsion by the union. See, e.g., *Big Three Industrial Gas*, supra.

[1] The General Counsel is proceeding here on behalf of the Charging Party Union. Thus, the term "Union," as used here, refers to the Union and to the General Counsel, who is proceeding on its behalf.

[2] I do not pass on the application of *Dean* to "non-salting" situations.

It is, of course, possible that the Union would excuse Carr from his organizational duties and would permit him to work at other places. However, these are matters peculiarly within the Union's knowledge and control. Thus, in order to preserve Carr's right to backpay, I would place the burden on the General Counsel and the Union to go forward with evidence that the Union was prepared to lift its limitations.[3]

[3] It should be noted that, throughout this dissent, I have spoken of the burden of going forward with the evidence. Thus, my view is not contrary to the principle that the burden of persuasion in these cases is on the wrongdoer respondent.